

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARK J. HUNT

Claimant

VS.

PLAZA WEST CARE CENTER

Respondent

AND

WESCO INSURANCE CO.

Insurance Carrier

Docket No. **1,047,618**

ORDER

Respondent and its insurance carrier request review of the December 11, 2009 preliminary hearing Order For Compensation entered by Administrative Law Judge Brad E. Avery.

ISSUES

The Administrative Law Judge (ALJ) found that claimant suffered accidental injury arising out of and in the course of employment. The ALJ further found that "it is more likely than not claimant gave timely notice to Shawn Douglas, the scheduling supervisor. Mr. Douglas was not claimant's direct supervisor but performed administrative functions sufficient to classify him as a representative of the employer."

Respondent requests review of whether claimant's accidental injury arose out of and in the course of employment with respondent and whether claimant gave timely notice.

Claimant argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Mark Hunt was employed as a certified nurse's aide for the respondent. On July 6, 2009, Hunt was told by Shawn Douglas, respondent's director of scheduling, to help assist a co-employee, Malcolm Boyd, put a heavily medicated Down Syndrome adult into the

back seat of a small sub compact car in order to be transferred to another facility. Hunt described his injury:

As we were trying to turn him into the vehicle to position him into the seat, I felt like a sharp pain and heard a popping sound to my shoulder area, and basically, you know, he just fell into the seat because I couldn't hold him no more.¹

Hunt told Douglas, who was standing outside the vehicle, that he felt a sharp pain in his shoulder. Hunt testified that Douglas took him to see Beverly Adams, respondent's director of human resources, to report his injury. Hunt further testified that Ms. Adams jotted down the date, time and what had happened. One of respondent's nurses gave him some medications and he was sent home. Hunt admitted that he did not request treatment at that time.

Ms. Adams' version of the events was that Douglas brought Hunt to see her on July 27, 2009 and that Hunt denied he had suffered a work-related injury. Likewise, Matt Harman, respondent's director of nursing, testified that he did not know claimant alleged a work-related injury until after a conversation with Hunt in September 2009.

Initially, respondent argues that Hunt failed to provide timely notice of his alleged work-related injury. K.S.A. 44-520 provides:

Notice of injury. Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

Hunt testified that Douglas was standing outside the vehicle while Hunt and another co-employee attempted to place the patient inside. Hunt further testified that he told Douglas that he heard his shoulder pop and he experienced an onset of pain that caused

¹ P.H. Trans. at 15.

him to let go of the patient. Douglas then took Hunt to Human Resources to report the incident. Although Douglas was not Hunt's immediate supervisor, it was clear that Douglas had an administrative position that was superior to Hunt. And Hunt was expected to follow Douglas' instructions. Harman testified:

Q. Okay. Now, am I correct in understanding that Mr. Hunt might be scheduled to work, come to work and there'd be a low census count and so he would be sent home after a half hour or so?

A. Yes, sir.

Q. Would that be something -- would Shawn Douglas be one of the people who would be sending him home?

A. It's possible. Normally that would be a charge nurse's decision or nurse manager's decision.

Q. But it might be Shawn Douglas?

A. It's possible.

Q. And might Shawn Douglas also give him instructions to go work at a different location than he originally had been assigned?

A. If he'd been asked to do so, yes, sir.

Q. And would you expect that Mr. Hunt would follow Mr. Douglas's directions to go to the other side and to help so and so do something?

A. Yes, sir.

Q. In other words, that would be an expectation that when somebody in administration asks a CNA to do something, they do what they're told?

A. Yes, sir.²

Where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe Hunt, Adams and Harman testify in person. In finding Hunt gave timely notice and met his burden of proof to establish he suffered accidental injury arising out of and in the course of his employment, the ALJ apparently believed Hunt's testimony over the conflicting testimony. Some deference may be given to the ALJ's findings and conclusions because he was able to judge the witnesses' credibility by personally observing them testify.

² P.H. Trans. at 93-94.

Douglas clearly had an administrative position and Hunt's uncontradicted testimony was that he told Douglas he had injured his shoulder. And Douglas may have very well witnessed the incident. Although there is disagreement regarding when, nonetheless there is agreement Douglas took Hunt to Human Resources to report the incident. Moreover, Hunt's testimony that he suffered a shoulder injury at work is uncontradicted. Hunt named Douglas and a co-worker as witnesses. Both were still employed by respondent at the time of the preliminary hearing but did not testify. Based upon the record compiled to date, this Board Member finds Hunt has met his burden of proof to establish that he suffered accidental injury arising out of and in the course of his employment and provided timely notice. The ALJ's Order For Compensation is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.³ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁴

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Brad E. Avery dated December 11, 2009, is affirmed.

IT IS SO ORDERED.

Dated this 31st day of March 2010.

DAVID A. SHUFELT
BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
Joseph R. Ebbert, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge

³ K.S.A. 44-534a.

⁴ K.S.A. 2009 Supp. 44-555c(k).